Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

DONN R. PROVEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The Eleventh Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a defendant is entrapped as a matter of law where the government has originated the criminal design, implanted it in the defendant's mind, and induced commission of the crime, and where the defendant clearly manifests a lack of predisposition prior to being approached by the government agent?

II. Whether an appellate court, in an entrapment case, may consider *all* inferences, not just *reasonable* inferences, in the government's favor in determining whether the government has proven the defendant's predisposition to commit the crime, absent the government's inducement, beyond reasonable doubt?

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OPINION BELOW

The unpublished opinion of the United States Court of Appeals, Eleventh Circuit, is contained in the Appendix (hereinafter "A") at pages 1-2.

JURISDICTION

The judgment to be reviewed was entered on November 13, 2000. A-1. Mr. Proven's Petition for Rehearing was denied on December 18, 2000. A-3. Jurisdiction is conferred on this Court by Title 28, U.S.C. section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

Mr. Proven and co-defendant Fairchild were charged in a two count superseding indictment with conspiracy to export helicopters to Iraq (in violation of Title 18, U.S.C. section 371); and attempt to deal in property intended for exportation to Iraq (in violation of Title 50, U.S.C. sections 1702 and 1705 and Title 18, U.S.C. section 2). The district court denied the defendants' motions for judgment of acquittal based on entrapment. The jury found

Mr. Proven and co-defendant Fairchild guilty as charged. Thereafter, the district court entered its judgment of conviction and sentenced Mr. Proven to 46 months in prison.

The evidence at trial established that Donn Proven, a professional administrator with extensive military and police experience including thirty years in the Marine Corps, joined together with a group of military colleagues to form Police & Military Instructors, Inc. PMI was dedicated to providing training, instruction, and maintenance for civilian applications of military and police technologies and operations including security and aviation. Proven's partners included Fairchild (a former legislator and narrowly defeated Arkansas gubernatorial candidate), a retired Colonel of the National Guard with 41 years of military experience, a military police officer with the United States Army, and a retired Brigadier General and former captain of the Chicago Police Department.

In 1996, Proven met an entrepreneur with business interests in the Philippines. The Philippines was looking to stimulate economic growth. This contact advised Proven about the Philippines' need for assistance in developing a security operation to combat routine bank robberies and other services PMI had to offer.

Proven traveled to the Philippines with his contact to explore potential business opportunities for PMI. Proven met various government officials, including the President of the Philippines, to discuss the Philippines' security needs. Proven met with a Philippines business consultant who was asked to assist Proven in complying with governmental regulations necessary to set up a potential

business for sales, rentals, and maintenance of helicopters. The business contemplated importing some United States manufactured military helicopters. The men discussed the needed authorizations and required "end user certificates" from the Civil Aeronautics Board. Proven also met other Philippines officials who gave further assistance and encouragement to Mr. Proven regarding his interest in developing business opportunities for PMI in the Philippines. These officials and consultants testified that Mr. Proven did nothing to conceal his identity or that of his principals, or otherwise did anything out of the normal or usual course of business.

While in the Philippines, Mr. Proven stayed in contact with the other PMI principals. He advised his board about being requested to present a letter of proposal regarding the security operation which would involve the use of 12 to 15 helicopters and a maintenance contract sought by PMI.

Upon his return to the United States, Proven met with PMI's board of directors. He reviewed his Philippines trip and the nature of the proposed venture. He specified that the operation would involve 15 helicopters which "could lead to many more repair and rebuild amendments to the contract." The operation would require maintenance, flight training, and probably the provision of all maintenance tools. He further discussed the need for submitting "a concept proposal." All members of the PMI board of directors approved pursuing this proposal.

In mid-January, 1997, Proven forwarded a letter of proposal to one of his Philippines contacts. The proposal

provided an overview of the Philippines' security problems, and outlined various steps that PMI proposed taking to remedy the problems including repairing non-flyable aircraft currently located in the Philippines for use in security, establishing an aviation maintenance and repair facility, and training Philippines nationals to maintain and repair their aircraft and to pilot them safely. Proven wrote a follow-up letter requesting input and a response to the proposal one and one-half months later. In early January, codefendant Fairchild inquired about a fleet of Canadian demilitarized helicopters being marketed by a private broker. Canada had obtained the fleet from the United States Army. Because these aircraft were on the United States munitions list, their sale was required to be approved by the United States Department of State. The owner was offering to sell the fleet for $68,000.00 Canadian dollars per helicopter, making the total price for the 45 helicopter fleet $3,060,000.00.

Fairchild wanted to purchase two of the helicopters, but the broker had countered that the seller would not sell fewer than twenty-two. Fairchild responded that he might be interested in five. By March or April, the broker indicated that there were thirty-five helicopters available and that a letter of intent and non-refundable deposit of $750,000.00 would be required to inspect them.

In further negotiations, Fairchild advised the broker that his true interest was a service contract in the Philippines but that he could not get the contract until he could show a contract to purchase the necessary helicopters. A price of $152,000.00 United States dollars per helicopter was discussed.

The broker began contacting Canadian and American officials to determine the viability of a sale to Fairchild. He specifically advised Fairchild that a resale could not be made to an unfriendly country. Fairchild stated that this was not a problem because the helicopters were going to the Philippines. Fairchild further assured that complying with the State Department's "end user certificate" requirement would not be a problem.

By March when it became clear that the entire fleet would have to be purchased to obtain the two desired helicopters, PMI contacted another broker to find a purchaser for the balance of the helicopters. Proven emphasized: "We cannot involve ourselves in non-disclosure with the sale of aircraft, training on them, or maintenance of them. In order for us to sell them we need U.S. State Department participation in the contract process and there [sic] approval of the sale." A-4-5.

By mid-March, 1997, Hugh Redditt, a twenty-year veteran helicopter broker and former paid informant for United States Customs, had been contacted about purchasing the Canadian helicopters. Redditt was specifically told that the sellers were military people and that the entire transaction would have to be made with State Department approval. A-6.

Shortly after being contacted, Redditt contacted Customs. He claimed he was suspicious of the broker because he would not disclose the identity of the seller or the sale price and he believed State Department approval would be nearly impossible to obtain. By mid-April, Customs had undertaken Redditt's supervision in pursuing the sellers. Redditt began tape recording all of his telephone

conversations and meetings regarding the proposed helicopter transaction.

In a taped telephone conversation on April 15, 1997, PMI's broker told Redditt that the sellers could not involve themselves in a "non-disclosure with the sale of the aircraft" and that to sell them, they would "need U.S. State Department participation in a contract, . . . in the contract process, and their approval of the sale." A-6.

Redditt contacted the broker a second time on April 15th. In response to Redditt's inquiry whether non-disclosure was a possibility, Proven and Fairchild responded unequivocally in a direct communique to Redditt, "Can't do it. We have to disclose to Department of State." As the broker and Redditt discussed the fact that the helicopters seemed to be overpriced at $150,000.00 apiece, Redditt persisted that the value of the helicopters depended upon what he could sell them for and that they might well be worth the price if they could be resold to "someone's who (*sic*) not supposed to have them." The broker again reminded Redditt of Proven's and Fairchild's written communique that the helicopters could not be sold to "people that can't have them."

On April 23, 1997, Redditt met in person with Proven and Fairchild. He told them numerous lies, distortions, and exaggerations to establish his expertise and gain their confidence. Proven and Fairchild explained that their real business was aviation maintenance and training and that helicopter procurement was only necessary to facilitate these primary aspects of their business. A-8-9, 10-11. Proven told Redditt that any sale would have to be

"squeaky clean . . . to clear the U.S. [State] Department . . . ;" the deal would have to "walk on water." A-9.

Redditt knew that Proven and Fairchild were asking $350,000.00 per helicopter and indicated his belief that they were not worth that much. In an effort to support this inflated price, Proven stated that the helicopters would bring his maintenance, training and transitioning expertise. Fairchild puffed that the helicopters had many uses, for police, search and rescue, and "just a multitude of operations that the OH-58 does better than just about any other aircraft out there. . . . " Redditt retorted that it would be very difficult to sell the helicopters to a "legitimate foreign government" which could provide services for free, and that the helicopters could only command a $350,000.00 sale price if they were sold to "an unfriendly place that couldn't provide you with an end user certificate. . . . " A-10. Proven's response was clear and immediate: **"Yeah but there's one little hitch in that scenario, I'm not about to do that."** *Id.* Redditt responded that Proven would have to be "more realistic about the selling price" to which Proven replied "Alright." *Id.*

Throughout the balance of this conversation, Proven and Fairchild continued to emphasize that their interest was not in the helicopters but, instead, maintenance and training contracts. A-10-12. Indeed, Proven and Fairchild had no arrangement to make a commission on any sale. A-11-12. Redditt acknowledged Proven's and Fairchild's desire to do any transaction "absolutely legitimately. . . . " As Redditt pushed Proven and Fairchild, again, to provide an "end user certificate" themselves in order to sustain the $350,000.00 per helicopter price, Fairchild continued to resist: "What about two hundred?"

Redditt flatly rejected this suggestion. Further expressing his revulsion at the idea of selling helicopters to an unfriendly nation, Proven remarked: " . . . I'm not a Republican anymore because my president, the one that just left office, sold weapons to my enemy, f --- him and the Republican party." A-12.

On May 7, 1997, Fairchild continued to suggest ways to purchase the helicopters without involving any "unfriendly country." He suggested that PMI could acquire the helicopters for the buyer, bring them into the United States, outfit them for police work, and then sell them piecemeal to police departments. A-13. Even after Redditt stated "that's not where my buyer wants them," Fairchild responded that he could ship the helicopters to Houston and then "sell them to whoever." A-14.

Discussions continued throughout May, June, and into July. Redditt continued to pressure Proven and Fairchild urging "my guys are ready to proceed," "we're ready to go at this end. . . . " In early July, with still no definitive plan to sell to Redditt's mystery buyers, Redditt pressed: "I want to get this show on the road otherwise I'm gonna lose confidence with these guys that want to spend this dough." A-16. Redditt made veiled threats, advising Proven and Fairchild that there were "all kinds of creeps all over the world" involved and that the buyers were "spooky" people who did things in "devious ways." A-17. He repeatedly expressed impatience with the delays. He periodically reminded Proven and Fairchild, who could not even afford domestic travel necessary to consummate any deal, that there would be millions of dollars in profits for them if the deal closed.

For their part, Proven and Fairchild continued to explore alternatives to Redditt's proposed sale to buyers from some undesignated, "unfriendly place." They suggested bringing the aircraft to the Middle East for humanitarian reasons through the International Red Cross with direct State Department approval. They suggested modifying the aircraft engines with State Department approval so that they would not need an end user certificate. As late as mid-July, Proven and Fairchild indicated they were still attempting to get "civilian" certifications to avoid the need for State Department approval. Informant Redditt continued to rebuff these ideas. He insisted that this was no time for surprises and they were "in this god damn boat, sink or swim. . . . "

Even at the July 17, 1997, meeting with Redditt which immediately preceded Proven's and Fairchild's arrests, Proven was still attempting to get the helicopters certified civilian to avoid the necessity of an end user certificate and State Department participation: "[I]f I can get them certified as to 206 Alpha 1s, I don't need an end user certificate and I can sell them as civilian aircraft." The identify of Redditt's buyers was still unclear, "[I]s it Iran or Iraq?" Nonetheless, on the next day, Redditt brought the contract for the sale of the thirty-five helicopters for ($12,250,000.00) twelve million two hundred and fifty thousand dollars. Shortly after signing the contract, Proven and Fairchild were arrested.

In addition to the facts of the circumstances directly surrounding the negotiations between Proven and Fairchild, and Customs informant Redditt, Mr. Proven presented numerous witnesses who testified about his impeccable reputation for law-abidingness, patriotism,

and lack of predisposition to sell helicopters to unfriendly nations. These witnesses including police officials who knew Proven from his twenty years of service on the Northfield, Illinois, Fire and Police Commission, business people he knew Proven from his lengthy tenure leading to his executive directorship of the Equipment and Tool Institute, and other decorated officers from the Marine Corps in which Proven served for thirty years.

Rejecting Proven's claim that the district court had erred in denying his motions for judgment of acquittal based on entrapment as a matter of law, the Eleventh Circuit Court of Appeals held that it must "view the evidence and make *all* inferences in favor of the government." A-2 (emphasis added). In light of this standard, the court went on to state that it could not say that the defendants were entitled to a judgment of acquittal as a matter of law.

REASONS FOR GRANTING THE WRIT

I. THE ELEVENTH CIRCUIT COURT OF APPEALS, BY AFFIRMING THE DEFENDANT'S CONVICTION AND REJECTING HIS ENTRAPMENT DEFENSE, HAS VIOLATED THE DUE PROCESS PRINCIPLES SET FORTH IN *JACOBSON v. UNITED STATES*, 503 U.S. 540 (1992), AND HAS RENDERED A DECISION THAT CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER FEDERAL CIRCUIT COURTS OF APPEALS.

In *Jacobson v. United States*, 503 U.S. 540 (1992), this Court reiterated that "Government agents may not originate a criminal design, implant in an innocent person's

mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute." *Id.* at 548. Culminating a solid line of precedents that condemned government inducement of crime in suspects that otherwise lack the predisposition to commit offenses on their own, *e.g., United States v. Russell*, 411 U.S. 423 (1973); *Sherman v. United States*, 356 U.S. 369 (1958); *Sorrells v. United States*, 287 U.S. 435 (1932), this Court held in *Jacobson* that "the Government overstepped the line between setting a trap for the 'unweary innocent' and the 'unweary criminal,' . . . and as a matter of law failed to establish that petitioner was independently predisposed to commit the crime for which he was arrested . . . ." *Id.* at 542.

Although the Eleventh Circuit's decision in the instant case fails to recite the facts underlying its decision or explain its analysis of them, the trial record cannot be squared with this Court's precedents and those of other federal circuit courts of appeals condemning entrapment. The Eleventh Circuit has erected a virtual insurmountable burden to a defendant demonstrating lack of predisposition. The standards it has employed prevent it from fulfilling its constitutional role under the Due Process Clause of ensuring that the government does not manufacture a crime and then, having led an unsuspecting citizen down the road to criminal misconduct, spring that trap to take its trophy.

In *Jacobson*, this Court reviewed, and ultimately reversed, the Eighth Circuit's decision which, upon rehearing *en banc*, affirmed the defendant's conviction, rejecting his argument that he was entrapped as a matter of law. *United States v. Jacobson*, 916 F.2d 467 (8th Cir.

1990), *rev'd*, 503 U.S. 540 (1992). *Jacobson* concerned a fifty-six-year-old veteran-turned-farmer who ordered magazines entitled Bare Boys I and Bare Boys II from a California adult bookstore. *Id.* at 542. The magazines depicted nude preteen and teenage boys. *Id.* at 542-3. After federal law changed rendering receipt through the mails of sexually explicit photographs of children illegal, federal agents who obtained the bookstore's mailing list undertook to test Jacobson's willingness to continue receiving child pornography. *Id.* at 543.

Federal agents first sent Jacobson a letter from the fictitious American Hedonist Society touting a persons' "right to read" what the person desires and "right to seek pleasure without restrictions being placed . . . by outdated puritan morality." Upon Jacobson's enrollment, the organization responded with a sexual attitude questionnaire on which Jacobson indicated that he "enjoy[ed] . . . [p]re-teen sex." *Id.* at 544. A federal agent next sent Jacobson a solicitation from a supposed consumer research company seeking responses from people who "believe in the joys of sex of and the complete awareness of those lusty and youthful lads and lasses of the neophite [*sic*] age." *Id.* Jacobson responded that he was interested in "teenage sexuality." *Id.* The government next sent Jacobson a mailing from a fictitious organization "founded to protect and promote sexual freedom and freedom of choice." This included another survey on which Jacobson indicated "above average" but not high interest in "[p]reteen sex-homosexual" material. *Id.* This organization replied with materials indicating it was a lobbying organization with the purpose, among others, of

eliminating "any legal definition of the age of consent." *Id.* at 545. These materials contained a list of potential "pen pals" with similar interests to which Jacobson did not respond.

By this time, thirty-four months had passed since the government obtained Jacobson's name; twenty-six months had passed since agents began its mailings to Jacobson. Now, a Customs pornography sting sent Jacobson a brochure advertising photographs of young boys engaging in sex. *Id.* at 546. This time, Jacobson ordered a set of photographs advertised as depicting "young boys in sex action fun." *Id.* at 555. For unknown reasons, the order was never delivered. The second time a catalogue was sent, Jacobson ordered a magazine called "Boys Who Love Boys" described as "11 year old and 14 year old boys get in on in every way possible. . . . ." *Id.*

Upon these facts, the court of appeals concluded that the government had merely provided Jacobson with an opportunity to illegally purchase child pornography, that Jacobson was predisposed to commit this offense, and, thus, that the question of Jacobson's entrapment was properly submitted to, and decided by, the jury. *Id.*, 916 F.2d at 470. Reversing, this Court found that the facts established entrapment as a matter of law. This Court acknowledged that agents may lawfully offer the opportunity to, for instance, buy or sell drugs, and if the offer is accepted, make an arrest. *Id.*, 503 U.S. at 549-50. The Court explained that where the government simply provides an opportunity to commit a crime, "the entrapment defense is of little use because the ready commission of

the criminal act amply demonstrates the defendant's predisposition." *Id.* at 550. By contrast, in *Jacobson*, the petitioner had been "the target of 26 months of repeated mailings and communications from Government agents . . . ." *Id.* Thus, though the petitioner was predisposed to break the law when he ultimately ordered the child pornography, this Court held that "the Government did not prove that this predisposition was independent and not the product of the attention that the Government had directed at petitioner [over the prior 26 months]." *Id.*

This Court eschewed the government's claimed evidence of predisposition prior to its mailing campaign that Jacobson had ordered and received the Bare Boys magazines. Although this may have reflected Jacobson's sexual preferences, it was not illegal at the time. *Id.* at 550-51. Regarding the government's evidence of predisposition gathered during its investigation, this Court viewed the government entreaties to support individual rights and to "obtain and read [sexually explicit] material[s] as part of a fight against censorship and the infringement of individual rights" as an exertion of "substantial pressure . . . ." *Id.* at 552. Regarding Jacobson's ultimate orders placed in response to the government's final solicitations, this Court observed:

> Petitioner's ready response to these solicitations cannot be enough to establish beyond reasonable doubt that he was predisposed, prior to the government acts intended to create predisposition, to commit the crime of receiving child pornography through the mails. . . . The evidence that petitioner was ready and willing to

> commit the offense came only after the Government had devoted 2½ years to convincing him that he had or should have the right to engage in the very behavior prescribed by law. Rational jurors could not say beyond a reasonable doubt that petitioner possessed the requisite predisposition prior to the Government's investigation and that it existed independent of the Government's many and varied approaches to petitioner.

Id. at 553.

Other federal courts of appeals have followed this Court's lead in carefully scrutinizing inducement and predisposition in entrapment cases. In *United States v. Brooks*, 215 F.3d 842 (8th Cir. 2000), the court reversed the defendant's conviction of distribution of controlled substances based on a finding of entrapment as a matter of law. The government had argued that the defendant's prior conviction of possession of cocaine with intent to distribute was evidence of predisposition. *Id.* at 846. Although the court recognized this evidence was probative, it concluded that, standing alone, it was insufficient to establish predisposition. *Id.* The court pointed to *Sherman v. United States*, 356 U.S. 369 (1958), in support. There, though the defendant had been convicted of two prior drug offenses, one sale-related and one for possession, this Court found insufficient evidence to establish predisposition. *Id.* at 375-76.

In *Brooks*, the government urged that the entrapment defense had been fully considered by the jury and the court should be loath to disturb its verdict. *Id.*, 215 F.2d at 847. The court responded:

> The continuing vitality and integrity of our "government of laws" would be imperiled if we sanctioned the manufacturing of crime by those responsible for upholding and enforcing the law. . . . The government may not condemn an otherwise innocent person for committing, at the behest of the government, a crime which the government itself has devised.

Id. (citation omitted).

In *United States v. Poehlman*, 217 F.2d 692 (9th Cir. 2000), the court likewise reversed a jury verdict of guilty for crossing state lines for the purpose of engaging in sex acts with a minor, finding entrapment as a matter of law. The government urged that there was abundant evidence of predisposition: the defendant's graphic, detailed descriptions of sexual acts he would engage in with the undercover agent's fictitious children; his statement that he "always looked at little girls," his enthusiastic response to the question whether he believed the fictitious children would be ready for certain sexual acts, "God, I hope so;" and the fact that the first mention of having sex with the children, and the description of each proposed sexual act in which they would engage, originated with the defendant. *Id.* at 703-07. Despite the inferences that could have been drawn from this evidence of predisposition, and the jury's verdict of guilty, the court reversed the defendant's conviction.

As in *Jacobson*, *Brooks*, and *Poehlman*, Mr. Proven maintains, and his trial record demonstrates, that, notwithstanding the Eleventh Circuit's opinion, the government failed to sustain its burden of proving that he was

predisposed to commit the offense of which he was convicted. Unquestionably, the government, through its agent/informant Redditt, originated the criminal design. It was Redditt who first raised the specter of selling the helicopters to an unfriendly country. A-10. Proven and Fairchild repeatedly rejected Redditt's suggestion, both in written communications and telephone conversations. *E.g.*, A-4-5, 6, 9. None was perhaps as forceful and direct as Proven's immediate response to Redditt's urging that the helicopters could only command a $350,000 sale price if they were sold to an unfriendly place, "Yeah but there's one little hitch in that scenario, I'm not about to do that." A-10.

Throughout the next three months, Proven and Fairchild resisted Redditt's persistent suggestions of criminal misconduct by proposing, several times, a lower sales price, *e.g.*, A-10-12, and alternative, legitimate means of disposing of the helicopters. *E.g.*, A-13-15. Redditt stubbornly rebuffed these suggestions. He persisted in his efforts to inveigle Proven and Fairchild through promises of millions of dollars in profits and the thinly veiled threats of the undisclosed buyers. *E.g.*, (there are "all kinds of creeps all over the world" involved); A-17 ("spooky" people who do things in "devious ways"), who were counting on Proven and Fairchild to facilitate the transaction.

The dissenters in *Jacobson* protested that the petitioner's eager response to the opportunity to commit a crime dispelled his claim of lack of predisposition:

> Keith Jacobson was offered only two opportunities to buy child pornography through the mail. Both times he ordered. Both times, he

> asked for opportunities to buy more. He needed no Government agent to coax, threaten, or persuade him; no one played on his sympathies, friendship, or suggested that his committing the crime would further a greater good. In fact, no Government agent even contacted him face-to-face.

Id., 503 U.S. at 554. They noted that "the most important factor [in determining predisposition] . . . is whether the defendant evidenced reluctance to engage in criminal activity which was overcome by repeated Government inducement." *Id.* (quoting *United States v. Kaminski*, 703 F.2d 1004, 1008 (7th Cir. 1983) (citation omitted)).

In the instant case, Mr. Proven and codefendant Fairchild exhibited strong resistence to the government's criminal scheme throughout three full months of intensive negotiations. Government agent Redditt coaxed, threatened, and persuaded them through, *inter alia*, repeated promises of millions of dollars in profits, to go along with the government's scheme. Proven and Fairchild's resistence persisted through the final meeting preceding the signing of the contract which obligated Redditt's still undisclosed clients to payment of more than twelve million dollars. This resistence, together with the other evidence, undermined any reasonable inference of predisposition.

By its decision, the Eleventh Circuit Court of Appeals has, essentially, insulated unconstitutional governmental entrapment from appellate review. By viewing all evidence and *all* inferences (even ones that are unreasonable) in favor of the government, the court has abdicated

its constitutional duty to scrutinize governmental investigative techniques that are contrary to due process of law. The decision is contrary to those principles set out in *Jacobson* and the decisions of other circuit courts of appeals exemplified by *Brooks* and *Poehlman*. To rectify this conflict and reinitiate appropriate standards in the Eleventh Circuit for review of entrapment cases, this Court should review this case and reverse Mr. Proven's conviction.

II. THE ELEVENTH CIRCUIT COURT OF APPEALS, BY DRAWING *ALL* INFERENCES IN FAVOR OF THE GOVERNMENT IN EVALUATING WHETHER IT PROVED THE DEFENDANT'S PREDISPOSITION TO COMMIT AN OFFENSE, HAS RENDERED A DECISION THAT CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER FEDERAL CIRCUIT COURTS OF APPEALS.

The role of a court in assessing the sufficiency of the evidence in an entrapment case is doubly important. Not only must it ensure that government does not manufacture a crime and then implant the disposition to commit the crime in the mind of an innocent person, *Jacobson*, 503 U.S. at 553, it also must guard against a violation of due process by ensuring that the evidence would support a reasonable jury determination of guilt beyond reasonable doubt. *See In re Winship*, 397 U.S. 358 (1970). When the evidence fails to meet this strict standard, courts should, and must, intervene. *See Jacobson*; *United States v. Poehlman*, 217 F.3d 692 (9th Cir. 2000); *United States v. Brooks*, 215 F.3d 842 (8th Cir. 2000).

In the decision under review, the Eleventh Circuit asserted that in its review of the evidence, it must "make *all* inferences in favor of the government." A-2. (Emphasis added). The court relied on *United States v. Francis*, 131 F.3d 1452 (11th Cir. 1997), *cert. denied*, 525 U.S. 986 (1998), and *United States v. Brown*, 43 F.3d 618 (11th Cir.), *cert. denied*, 516 U.S. 917 (1995), for this proposition. These cases too, which also concerned entrapment, similarly declared that in reviewing evidence of predisposition, the evidence and *all* inferences must be viewed in favor of the government. *Francis* at 1456; *Brown* at 622.

Contrary to the decision below, this Court's caselaw, as well as caselaw from other federal circuit courts of appeals, make clear that inferences may be drawn in the government's favor *only* if they are *reasonable*. In *Jacobson v. United States*, 503 U.S. 540 (1992), the dissenters criticized the majority for "fail[ing] to draw all reasonable inferences in the government's favor." *Id.* at 559; *cf. Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (jury entitled to resolve conflicts in the evidence but only allowed to draw "reasonable inferences" from basic facts). Accordingly, this Court and others have reversed defendants' convictions in entrapment cases precisely because the government's evidence and inferences of predisposition were unreasonable. *E.g., Jacobson; Sherman v. United States*, 356 U.S. 369 (1958); *Poehlman; Brooks*. The decision below conflicts with these decisions. The court below has departed from the accepted and usual course of judicial proceedings. S.Ct. R. 10(a).

While the federal circuit courts of appeals have uniformly rejected the prior distinction for circumstantial evidence cases followed by many courts that required the

government to exclude all reasonable hypotheses of innocence, *e.g.*, *United States v. Collazo-Aponte*, 216 F.3d 163, 192 (1st Cir.) *pet. for cert. filed*, No. 00-8391 (Dec. 18, 2000); *United States v. Reveles*, 190 F.3d 678, 687 (5th Cir. 1999); *United States v. Bell*, 678 F.2d 547, 549 (5th Cir. Unit B 1982), *aff'd on other grounds*, 462 U.S. 356 (1983), they, nonetheless, are sensitive to the vagaries of circumstantial evidence and review it with heightened scrutiny. Courts generally recognize, for instance, that if the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence, then a reasonable jury *must* entertain a reasonable doubt. *E.g.*, *United States v. Colon-Munoz*, 192 F.3d 210, 219 (1st Cir. 1999), *cert. denied*, 529 U.S. 1055 (2000); *United States v. Reveles*, 190 F.3d at 687; *United States v. Ortega Reyna*, 148 F.3d 540, 543 (5th Cir. 1998); *Cosby v. Jones*, 682 F.2d 1373 (11th Cir. 1982). Even the Eleventh Circuit in *United States v. Villegas*, 911 F.2d 623 (11th Cir. 1990), warned that "inferred factual conclusions based on circumstantial evidence are permitted only when, and to the extent that, human experience indicates a probability that certain consequences can and do follow from the basic circumstantial facts." *Id.* at 628 (citation omitted). Accordingly, the government is only entitled to the benefit of the *reasonable* inferences in an appellate court's evaluation of the sufficiency of the evidence. *E.g.*, *Collazo-Aponte*, 216 F.3d at 192; *Colon-Munoz*, 192 F.3d at 219; *Ortega Reyna*, 148 F.3d at 543; *United States v. Frost*, 125 F.3d 346, 354 (6th Cir. 1997), *cert. denied*, 525 U.S. 810 (1998); *United States v. Leoz-Quijada*, 107 F.3d 786, 794 (10th Cir. 1997); *United States v. Baker*, 98 F.3d 330, 338 (8th Cir. 1996), *cert. denied*, 520 U.S. 1179 (1997).

As in *Jacobson*, in the context of entrapment cases, the federal circuit courts of appeals uniformly allow the government the benefit of only *reasonable* inferences in determining whether the government's proof has overcome a defendant's claim of entrapment and, more specifically, lack of predisposition. *E.g., United States v. Duran*, 133 F.3d 1324, 1336 (10th Cir. 1998); *United States v. Salerno*, 66 F.3d 544, 548 (2d Cir. 1995), *cert. denied sub nom., Di Girolamo v. United States*, 516 U.S. 1063 (1996); *United States v. Gonzalez*, 19 F.3d 1169, 1172 (7th Cir. 1994); *United States v. Beissel*, 901 F.2d 1467, 1469 (8th Cir. 1990); *United States v. Jannotti*, 673 F.2d 578, 599 (3d Cir.), *cert. denied*, 457 U.S. 1106 (1982). The distinction between construing *all* inferences in favor of the government as the court did below, and accepting only *reasonable* inferences in favor of the government as these cases dictate, is critical. While a defendant certainly carries a heavy burden on appeal to demonstrate entrapment as a matter of law, a rule allowing an appellate court to consider *all* inferences in favor of the government in reviewing the evidence would present an insurmountable barrier to effective judicial review. Even if a strained reading of the record below viewing *all* inferences in favor of the government might allow an affirmance, restricting such inferences to only reasonable ones would not.

The standard employed by the court below, accepting *all* inferences of predisposition in favor of the government, constitutes an abdication of the court's double responsibility in entrapment cases. The decision of the Eleventh Circuit conflicts with *Jacobson* and the numerous cited decisions of the federal circuit courts of appeals. To correct the Eleventh Circuit's misapplication of the law,

this Court should review the decision below and reverse Mr. Proven's conviction.

CONCLUSION

For these reasons, Petitioner respectfully prays that this Court grant its Writ of Certiorari.

Respectfully submitted,

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No. _____

In The

Supreme Court of the United States

DONN R. PROVEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The Eleventh Circuit Court Of Appeals

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-4374

D.C. Docket No. 97-06104-CR-WPD

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DONN R. PROVEN, ROBERT S. FAIRCHILD, JR.,

Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Florida

(Filed November 13, 2000)

Before BARKETT and WILSON, Circuit Judges, and GEORGE*, District Judge.

PER CURIAM:

Donn R. Proven and Robert Fairchild appeal the denial of their motion for judgment of acquittal based on entrapment relating to their conviction for (1) conspiracy to violate 22 U.S.C. § 2278 (Arms Export Control Act), 18 U.S.C. § 1001 (False Statement to a Federal Agency), and 50 U.S.C. §§ 1702 and 1705 (International Emergency

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* Honorable Lloyd D. George, U.S. District Judge for the District of Nevada, sitting by designation.

Economic Powers Act), all in violation of 18 U.S.C. § 371; and (2) attempting to deal in property intended for exportation to Iraq, in violation of 50 U.S.C. §§ 1702 and 1705 and 18 U.S.C. § 2.

We review the district court's denial of a motion for judgment of acquittal *de novo*. *United States v. Francis*, 131 F.3d 1452, 1456 (11th Cir. 1997). In doing so, we view the evidence and make all inferences in favor of the government. *Id.*; *see United States v. Brown*, 43 F.3d 618 (11th Cir. 1995). We cannot overturn the jury's verdict if any reasonable construction of the evidence would allow the jury to find the defendants' guilty beyond a reasonable doubt. *Francis*, 131 F.3d at 1456; *Brown*, 43 F.3d at 622.

In light of this standard, having reviewed the record and considered the arguments of counsel, we cannot say that the defendants were entitled to a judgment of acquittal as a matter of law. Accordingly, the convictions in this case must be AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-4374-EE

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DONN R. PROVEN,
ROBERT S. FAIRCHILD, JR.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Florida

(FILED DEC 18 2000)

BEFORE: BARKETT, WILSON, Circuit Judges, and GEORGE*, District Judge.

PER CURIAM:

The petition(s) for rehearing filed by Donn R. Proven is DENIED.

ENTERED FOR THE COURT:

/s/ ROSEMARY BARKETT
UNITED STATES CIRCUIT JUDGE

EXCERPT OF DEFENDANT'S EXHIBIT 63

13 April 1997

Glenn:

This is to confirm our conversation of today regarding your E-Mail of 10 April 97 19:17:05 EDT I will answer the Questions in numerical order.

1. PMI I will be the EXCLUSIVE owner of the Aircraft as we plan to own the aircraft with your client's money. This will tie us all in and failure to perform will cost the non-performer dearly.

2. We have NO intention of disclosing any of the aircraft location(s) or there [sic] maintenance information and/or serial numbers until a $75K per aircraft deposit (non-refundable) has cleared our bank.

3. The cost of shipping the birds will be part of the final sale price but will be included in the transaction. As we discussed, it is in all of our best interests to ship the birds (2) to a container. Our plan is to remove the main rotor blades and the tail section which will allow the two birds per container. We will also meet the shipment at its final destination. We will then reinstall the components and test fly each aircraft. This is assuming we have a training and maintenance contract in addition to the sale of the aircraft. Frankly, we would be reluctant to sell the aircraft without maintenance and training.

4. We can not involve ourselves in non-disclosure with the sale of aircraft, training on them, or maintenance of them. In order for us to sell them we need US State

Department participation in the contract process and there [sic] approval of the sale.

5. The question of commissions on the sale is not our issue. We will own the aircraft and our deal is with you on your participation in the sale so if your client has commission commitments, that is his problem.

6. Your associates attempt to show the limited market for these aircraft does show knowledge of the market but they are on the wrong course if they think the market has either the number or the quality of aircraft available for this kind of money. It is in fact the very reason they need to act quickly and not try to negotiate price concessions.

Glenn. Spare parts on this deal could also be part of this – If they are willing to buy 40 or more aircraft. However, we will not sell parts without training and maintenance. All these birds are AIRWORTHY!! Bob has started with the agents for these aircraft – we should have an answer by the end of the week. It is possible they are already sold.

Keep in touch

SemperFi

Donn

[Bob I am home call me on this]

EXCERPT OF DEFENDANT'S EXHIBIT 46A

Call from Manuel OLIVEIRA to SA-23-WP on April 15, 1997. This conversation was terminated at approximately 1:25 p.m. Page 1

MO: Manuel OLIVEIRA

CI: SA-23-WP

Recording starts

MO: Who want to sell them, they're owners of the aircraft, uha, they have no intention. I'm just basically recapping what their uha, what uha, the guy's, Glenn MORRIS, fax to be was. They have no intention of disclosing the location of the aircraft's or serial numbers until they get the deposit of seventy five thousand dollars non-refundable towards the aircraft and they've cleared banks uha, the shipping costs will have to be part of the final sale and uha, and if uha, they're basically saying aside from rotors and tails sections being removed and, and they probably can put two uha, two per container and uha, they will uha, they will assemble them and on final uha, wherever the destination is going to be. Uha, they says we cannot involved ourselves in a non-disclosure with the sale of the aircraft, trainer, maintenance and the team in order for us to sell the aircraft uha, we need U.S. State Department participation in a contract uha, in the contact [sic] process and their approval of the sale. Uha, the questions of commissions, they're saying the uha, they disagree with 10% uha, they would rather give us what they want to sell the aircrafts for and we could mark up from there. And uha, they agree of course that they are limited to a very limited market but they are saying that uha, for the few customer, they are big players and they are

shortage of it and they go on to say that uha, I guess maybe some were sold or so they don't specify so but they are saying that there are probably going to be twenty five uha, of these aircraft for sale uha, as apposed [sic] to the initial fifty and uha, he's gonna try to get me more information. So, I don't know if you want to any further with this or not. Get back to your people this is what they are telling me and uha . . .

CI: Send me a copy of that fax.

* * *

EXCERPTS OF GOVERNMENT'S EXHIBIT 1A

Meeting on April 23, 1997, between Hugh Redditt, Glenn MORRIS, Robert FAIRCHILD and Donn PROVEN in Fort Lauderdale, Florida.

* * *

[Page 9]

PROVEN: We need, we need, we need to lay a couple things on the line. First of all, once we have a letter of intent, we are perfectly willing to share the lineage, but I think that we should talk in general natures helicopter versus helicopter versus by what we got. We got twenty five cherrys, um, I, I expect that they are in fact, ah, flight folded in Lybell Helicopter in storage. But when they came out of service the high time bird had twelve thousand hours and the low time bird had four thousand hours and you and I both know there's very few places that we can find helicopters manufactured November '72 from December '71 alpha models with all the changes made on them all out of the book and apparently all the log books are clean. So, what I think we got here is a real cherry one time and one time only, you know, everybody says that in a deal, but I really got a gut feeling think that these are really good. I'll tell ya why I'm so high on these, because whoever we sell this to, I desire, I desire to sell the helicopters to some kind of training and operatioal use of these helicopters and the reason why that is because I'm gonna be responsible for the maintenance.

Redditt: Why are you gonna be responsible for the maintenance?

PROVEN: 'Cause I'm gonna get a maintenance contract with them . . .

Redditt: When you sell them . . .

PROVEN: Yes.

* * *

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Redditt: So the airplanes aren't owned by you at the moment? They're owned by someone else.

PROVEN: No, no.

Redditt: The ah, tryin' to find a home for these airplanes through civilian channels would be virtually impossible. The ah, how sensitive are you about ah, where the airplanes would go and the end use?

PROVEN: Um, I have to have squeaky clean where they go to clear the U.S. Department uh, I mean uh, the name of that . . .

FAIRCHILD: End use . . .

PROVEN: End user certificate . . .

Redditt: Uh-uh.

PROVEN: That walks on water because it's gotta clear bank and the State Department.

* * *

[Page 17]

Redditt: Um, I'm hung up on the three hundred and fifty thousand dollars. The three hundred and fifty thousand dollar number is the kind of

number that you would expect to get from somebody that wouldn't do you a friendly guy, someone that wouldn't be able to get you an end user certificate, ah,

PROVEN: These are the people that we have dealt with so far.

Redditt: Well, I mean, if you have, if you have, and it could be arranged, I'm certain, that these airplanes could go to an unfriendly place that couldn't provide you with an end user certificate, ah, maybe three hundred and fifty thousand dollars isn't too far.

PROVEN: Yeah, but there's one little hitch in that scenario, I'm not about to do that.

Redditt: Okay, well then you're gonna have to be more realistic about the selling price.

PROVEN: Alright.

* * *

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PROVEN: Canada had a hundred twenty five to hundred and fifty thousand dollars (inaudible). I'd rather walk away from it than do that and I don't have a particular aircraft business. I want to sell them to somebody who wants the package, I want them to not only buy these aircraft I want to buy maintenance contracts and agreements and a training contract for (inaudible).

Redditt: Well, I mean, if you can do all of that, I mean, if you can get a maintenance contact [sic], a training contract and all of that business along with the airplanes that, that's fine. I'm not in the maintenance or training business.

PROVEN: Well, that's how I back into this thing. I'm not in the airplane business, I understand it. But our business is selling training and military and law enforcement operations who use aircraft in, in and as a portion of whatever it is that they are doing and we generally get into the acquisition business because with the L, it's all wonderful, we don't have any airplanes and if we did, we don't have any trained pilots or planes.

* * *

[Page 25]

Redditt: If those people really don't care about the user certificates. Then we could go ahead and proceed and sell these airplanes for probably three hundred and fifty thousand dollars, and you guys aren't even (inaudible) and if you want a training contact [sic] and a maintenance contact [sic] that could be a side issue contingent upon the sale but a separate issue totally so that you guys are out the loop.

PROVEN: Yeah.

Redditt: Then on pay day ah, since you guys are talking to MORRIS, MORRIS then is the guy who distributes all the funds. If that can be arranged than maybe your three fifty could work. The ah, um, I, I assume that beyond the training and maintenance that you were interested in, there's something in it for you if you're part of this transaction and make the airplanes go away with the owner.

FAIRCHILD: No.

PROVEN: No.

Redditt: You're not.

FAIRCHILD: No.

* * *

[Page 37]

Redditt: The ah, the ah, we ah, we ah, don't need that. Because this is no big deal. From the scheme of things this is just another normal transaction. So if you can get back to your guys and tell them what we discussed and there's no problem with money, the buyers will have no problem getting this money up based on deposit, I mean based on inspection and ah, no problem.

PROVEN: ~~And~~ If we produce an end user certificate?

Redditt: I would think so. If you want three hundred and fifty thousand dollars per machine. . . .

FAIRCHILD: What about two hundred?

Redditt: No.

* * *

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PROVEN: Well, to give you an idea of my age, the first presidential election that I ever voted in, I voted for Barry Goldwater and ah, I belong to no political organized party for the Republicans but I'm not a Republican any more because my president, the one that just left office, sold weapons to my enemy, fuck him and the Republican party.

Redditt: Who's the enemy?

PROVEN: Iran.

Redditt: Oh.

* * *

EXCERPTS OF GOVERNMENT'S EXHIBIT 4A

Telephone call from Robert FAIRCHILD to Hugh Redditt on May 7, 1997. Ending time was approximately 10:35 a.m. Pages 1-2

FAIRCHILD: Robert FAIRCHILD

Redditt: Hugh Redditt

Recording starts

FAIRCHILD: When we first met . . .

Redditt: Uh-hu.

FAIRCHILD: PMI, the company that Donn and I are with, ah, we were thinking that because of all the problems that we have perceived on the sellers end that PMI would ah, acquire title of those aircraft for the buyer. That is still a possibility, if you would like to approach it from that way. Uh, if they would like to put the money up and if they are prepared to do cash, PMI could acquire the aircraft. Now I'm checking to see if we can bring them into the country and right now I have not found a reason that I can't.

Redditt: What country?

FAIRCHILD: U.S.

Redditt: Uh-hu.

FAIRCHILD: Uh, and I'm trying to do some other things for some police departments and they acquire, as you are well aware, they're acquiring National Guard helicopter and stuff like that and repainting them and fitting them and using them for police work. Uh, but PMI would not even have to produce an end user agreement until we

bought them and then we would bring them into the country. We could bring them into the United States and then sell them piece meal to police departments or you know whatever and I don't think that that's a big deal at this point. But it, it depends on sort on your buyer, ah, and I don't, I'm at a real loss as to why under those circumstances, why we couldn't just crate them two to a container and put them on a damn railroad and bring them into this country.

Redditt: Well that's not where my buyer wants them. He wants them shipped. I'll know definitely where he wants them shipped later today.

FAIRCHILD: Well, but, but I'm sayin' that if, that if, we needed to do it that way . . .

Redditt: Uh-huh.

FAIRCHILD: Or if we needed to put it on a uh, boat and ship it to Houston so that, you know, the paperwork for PMI was taken care of as long as the Canadian government got a, a clean end user statement from PMI that they are going to go to Houston, Texas, or whatever . . .

Redditt: Well, how would they, how would you then tranship them somewhere else if you are the owner?

FAIRCHILD: Well, then I would sell them to whoever.

Redditt: Yeah, I know, but I mean, ah, they would still have to have an end user's certificate.

FAIRCHILD: Well, we could work on that. I mean, I'm just tryin' to come up with possibilities.

* * *

EXCERPTS OF GOVERNMENT'S EXHIBIT 24A

Transcript of conversation between Proven, co-defendant Fairchild, and informant Redditt on July 2, 1997.

[Page 3]

* * *

PROVEN: And, and . . . I, I wasn't, I wasn't excited I was frustrated.

Redditt: No, I understand. I can understand exactly where you would be coming from.

PROVEN: Yeah, well.

Redditt: It's not, look trust me, I'm frustrated too.

[Page 4]

PROVEN: I know.

Redditt: I want to get this show on the road otherwise I'm gonna lose confidence with the guys that want to spend this dough.

PROVEN: Exactly right.

Redditt: And ah, time kills deals.

* * *

[Page 8]

Redditt: See the situation here now as I see it is that ah, RAVEN wants to buy these airplanes . . .

PROVEN: Yes.

Redditt: I have the keys to the dough.

PROVEN: Yes.

Redditt: All you have to do is present me with the, the [Page 9] paperwork that is required by the buyers.

PROVEN: Okay.

Redditt: And the buyers are spooky because they have been had many times before.

PROVEN: Okay.

Redditt: And they do things in devious ways and ah, there's no sense in, you know, reminding you how the mind of an Iraqi works.

PROVEN: Right, right.

Redditt: But ah, they do things that might not seem logically correct to you or me from our cultures standpoint . . .

PROVEN: Exactly.

Redditt: They have their own . . .

PROVEN: Their own, it's their own Arabic style.

Redditt: Yup. So what every that is, we just be accommodating as we can to them, and at the same time make sure Mr. FINLAY is a . . .

PROVEN: Is playing the game the way he ought to be.

Redditt: Yeah.

* * *